

Constitutional Law: Crisis Government Becomes the Norm

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There can be little doubt that humanity is on the verge of a profound social transformation, at the edge of a new social frontier.¹

I. INTRODUCTION

Any forecast of the direction American constitutional law will take must perforce be based on a view of the type of society, national and planetary, in which the Document of 1787 and its 26 amendments will operate as this nation's fundamental law. Both predictions—of law and of society—are risky, but necessary. The time is past when lawyers can fly backwards to see what has happened. Law must be avowedly instrumental, for America has assumed the task not only of saying what the law is, but what it ought to be. The themes of this essay are multiple: (a) law, including constitutional law, reflects society; it is, in brief, the *zeitgeist* rather than "the law" that guides constitutional change;² (b) change will remain a constant in the social order, as the scientific-technological revolution continues its dizzy, uncharted pace; and (c) the United States has entered a time when crisis will become the norm. In what follows, those themes will be developed in the context of several constitutional relationships: (a) changes within the separation of powers in the national government; (b) alterations in federalism; (c) adaptation of the Constitution to life on Spaceship Earth; (d) recognition of the dimension of private governance; and (e) the desuetude of the individual as the basic unit of American society.

Those are indeed large matters; each can be dealt with only summarily in this brief essay. Much has had to be left out, not only in analysis of the five categories just mentioned, but also with regard to specific doctrines.³ It is difficult, and no doubt rash, to peer into the future. At best, the future is a shore dimly seen; at worst, it can, because of developments not now known or foreseeable, be wholly different from what one envisages.⁴ Even so, there seems to be a growing realization, not yet a consensus, that

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1. L. BROWN, *THE TWENTY-NINTH DAY* 324 (1978).

2. See A. MILLER, *THE SUPREME COURT: MYTH AND REALITY* 3-9 (1978).

3. By and large, this essay is one in which I say what is likely to be, not what should be. Specific doctrines may be inferred from the five trends discussed.

4. See D. PRICE, *THE SCIENTIFIC ESTATE* (1965).

Homo sapiens is in for a continuing time of troubles.⁵ Lord Ashby of Brandon believes that we are not merely in a crisis but a "climacteric."⁶ If so, that is something new under the constitutional sun. I agree with him, but do not welcome what seems sure to come. We have, however, to accept life and the world as they are, not as we wish them to be. Only harm will come from refusing to confront and attempt to deal with the coalescing troubles—the "vulnerabilities"⁷—of man kind. My main thesis, then, is that crisis government will soon become the norm, not only in the United States but also worldwide; and that will place unprecedented strains on the American constitutional order. Whether it will survive in anything like its present form—the Constitution's original texts, plus almost two centuries of gloss—is not at all likely. It is probable, as Arnold Toynbee has said, that increasingly despotic governments will develop as economic growth slows and population expands. "In all developed countries," he said in 1975, "a new way of life—a severely regimented way—will have to be imposed by a ruthless authoritarian government."⁸

In 1974, Senators Frank Church and Charles Mathias asserted that "emergency government has become the norm."⁹ There is no way to prove such a contrafactual proposition. Only time will give the answer. One believes it or one does not; to me the overwhelming weight of thoughtful opinion and the likelihood of being correct is on the side of the Toynbees¹⁰ and Browns¹¹ and Commoners¹² of the nation, rather than the Kahns.¹³

5. See E. CORNISH, *THE STUDY OF THE FUTURE* (1977) for an outline of the thinking of those who have given serious attention to studying the future.

6. Lord Ashby, *A Second Look at Doom*, The 21st Fawley Lecture delivered at Southampton University (Dec. 11, 1975) (photocopy of typed text). See E. ASHBY, *RECONCILING MAN WITH THE ENVIRONMENT* (1978); M. SHANKS, *WHAT'S WRONG WITH THE MODERN WORLD? AGENDA FOR A NEW SOCIETY* (1978). See also W. HARMAN, *AN INCOMPLETE GUIDE TO THE FUTURE* xi (1976):

The world is headed for a climacteric which may well be one of the most fateful in the history of civilizations. This convulsion is now not far off and most people sense something of it—although interpretations vary widely, like the well-known interpretations of the elephant by blindfolded people who feel different parts of the animal.

7. The term comes from H. BROWN, *THE HUMAN FUTURE REVISITED 179-218* (1978). He lists thermonuclear war, energy shortages, dependence on nonfuel minerals, food, social disruption, terrorism, and economic disruptions (such as inflation) as the vulnerabilities of an industrial nation. In sum: "Industrial man now lives in a complex and largely synthetic ecological system, new in the human experience and inadequately understood." *Id.* at 227.

8. Quoted in Takaski Oka, *A Crowded World: Can Mankind Survive in Freedom?*, *Christ. Sci. Mon.*, Feb. 10, 1975, at 5, col. 1 [hereinafter cited as Toynbee].

9. CHURCH & MATHIAS, *FOREWORD TO A BRIEF HISTORY OF EMERGENCY POWERS IN THE UNITED STATES, A WORKING PAPER PREPARED FOR THE SPECIAL COMMITTEE ON NATIONAL EMERGENCIES AND DELEGATED EMERGENCY POWERS UNITED STATES SENATE*, 93d Cong. 2d Sess. at v (1974).

10. Toynbee, *supra* note 8.

11. L. BROWN, *supra* note 1; H. BROWN, *supra* note 7.

12. B. COMMONER, *THE POVERTY OF POWER* (1975).

13. Herman Kahn is perhaps the leading exponent of the view that the future will be rosy. See, e.g., H. KAHN, W. BROWN & L. MARTEL, *THE NEXT 200 YEARS: A SCENARIO FOR AMERICA AND THE WORLD* (1976). See also R. MILES, *AWAKENING FROM THE AMERICAN DREAM—THE SOCIAL AND POLITICAL LIMITS TO GROWTH* (1976). A useful selected bibliography of future-oriented books may be found in E. CORNISH, *supra* note 5, at 259-82.

Even if the proposition is not accurate in detail, it surely is in general terms. That is as much as one can essay at this time.

The Constitution is predicated on the assumption that crisis is aberrational. No provision is expressly made for emergency government;¹⁴ but since the beginnings of the Republic, actions have been taken to deal with emergencies, actual or perceived.¹⁵ In all that time, the theory was that the Constitution remained the same. Conditions could change, as Chief Justice Hughes said in the *Blaisdell* case,¹⁶ which would enable extraordinary actions to be taken. But the Supreme Court has always adhered, without overt deviation, to the principles announced by Justice Davis in *Ex parte Milligan*.¹⁷ "The Constitution is a law for rulers and people, equally in war and in peace, and covers with its shield of its protection all classes of men, at all times, and under all circumstances." That is a nice sentiment, were it true; but it is not—not only in the past, but also in the present and surely in the future.

II. TRENDS OF CONSTITUTIONAL DEVELOPMENT

Law school study of constitutional law employs, speaking generally, the case method, with the case being defined as a Supreme Court opinion. Scholarship tends to be patient analyses of the intricacies of the reasoning, or lack of it, in given opinions. Well and good, so far as it goes; the trouble is that it does not go nearly far enough. Required is attention accorded to the Constitution "in operation" as well as the Constitution "of the books";¹⁸ and further, to the trends of structural development in the government brought into being by the Document of 1787. The present essay is concerned with several structural trends, rather than with specific constitutional doctrines.

A. Separation of Powers

That power in the American constitutional order has always flowed, albeit at times discontinuously, toward the Executive is a truism. That it will continue to do so may be predicted with confidence. However much Congress, in the wake of Watergate and the resignation of Richard Nixon, is trying to retrieve ceded powers or gain new ones, by no means can it do so. In 1967, a perceptive French observer dismissed the power of modern legislatures as an "illusion," maintaining that "the organs of representative

14. Save, perhaps, in the habeas corpus and declaration of war clauses. Some nations, notably France, with written constitutions do make express provision for emergencies. See M. VOISSET, L'ARTICLE 16 DE LA CONSTITUTION DU 4 OCTOBRE 1958 (1969). To date, Article 16 has been employed once, by President Charles de Gaulle, in the Algerian crisis in 1961. *Id.* at 414-15.

15. See A. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS (1976); A. MILLER, PRESIDENTIAL POWER IN A NUTSHELL (1977).

16. *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398 (1934).

17. 71 U.S. (4 Wall.) 2, 120-1 (1866).

18. W. WILSON, CONGRESSIONAL GOVERNMENT ¶10 (1885).

democracy no longer have any other purpose than to endorse decisions prepared by experts and pressure groups."¹⁹ The problems of governance are too many and too complex for two committees, one of 100 persons and the other of 435, to do much more than that. Efforts now being made to impose "Congressional vetoes" on specific actions of the public administration are by no means sure to survive constitutional challenge.²⁰ Members of Congress participate in the many "subgovernments"²¹ of Washington, but usually as individuals not as a collectivity.

Woodrow Wilson could write in 1885 that the chairmen of the standing committees of Congress were the most powerful governmental officials;²² but by 1908 he had changed his mind and clearly saw the rise of executive hegemony in government.²³ That trend has accelerated since then. Wars and rumors of wars, economic depressions, deep and irreversible immersion of the nation in world affairs, a monopoly of expertise in the Executive Branch—all these, and more, are forces that militate toward an even stronger President and bureaucracy. The President is not merely *primus inter pares* in the tripartite division of powers; he is *primus*. Period. Whoever lives in the White House, of whatever party, will continue to be the focal point of attention—and of actual governing power. The troubles of President Carter, so obvious in 1978, should not be taken as the norm.

Presidents will, to be sure, have to negotiate with Congress and with the bureaucracy, which is a force in its own right. But there can be no doubt that, in terms of formal authority as well as effective control, the reins of government are in the hands of the man living at 1600 Pennsylvania Avenue, not in the hands of those who work on Capitol Hill. No government of any consequence in the world is run otherwise. The spare generalities of Article II do not begin to demonstrate the range and nature of presidential power. Executive power, of course, has come without amendment; it has both been seized by the Executive and delegated to the public administration, including the President, by a Congress only too willing to forego scrutiny of the myriad details of routine problems of governance.

In recent years, the bureaucracy in Congress has greatly increased in size and influence. Little doubt exists about the actual legislative powers of the "third branch" of Congress—the oft-times nameless and faceless individuals who serve on committee or Congressional staffs. It is literally impossible for any one member of Congress to be privy to the details of the

19. J. ELLUL, *THE POLITICAL ILLUSION* (1967).

20. See, e.g., *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978); Miller & Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L. J. 367 (1977), and works cited therein.

21. See D. CATER, *POWER IN WASHINGTON* (1964).

22. W. WILSON, *supra* note 18.

23. W. WILSON, *CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES* (1908).

many programs of government or even of the bills on which he votes. So reliance is placed either on the leadership or, more likely, on staff members. Nevertheless, as compared with the nearly three million Executive Branch bureaucrats, Congress has no real chance to do more than to play catch-up on a few details of government. Public policy matters, large and small, ever more are settled with only perfunctory legislative cognizance and participation. The most that Congress can hope to do, and then not very often, is to make those in the Executive Branch think twice before acting. The future, to repeat, belongs to the Executive.

As with Congress, so too with the courts. Despite a flurry of activism in the past three decades, government by judiciary (the title of a remarkably silly book published in 1977)²⁴ is mere fantasy. Judges simply do not have the time or the power to do much more than erect standards toward which they can hope the people and the politicians will aspire. Judicial review of administrative action, for example, is noteworthy for its rarity; when it does take place, the administrator is usually sustained. Of the untold millions of administrative decisions made annually, what the administrator decides is usually final in fact, though not in theory. So, too, with the Supreme Court, which in fits of hyperbole has been described as an extraordinarily powerful political actor.²⁵ That simply is not true, given the range and nature of decisions important to Americans, whether as individuals or as members of groups. Lawyers and others like to think otherwise, to be sure; but it is clear that the power of the Supreme Court specifically, and of courts generally, is greatly overrated today, and that it will be even more attenuated in the future.²⁶ That is so despite *United States v. Nixon*²⁷ and the *Steel Seizure Case*.²⁸ We should, furthermore, always remember that constitutional interpretation is distinctly not a judicial monopoly.

24. R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

25. E.g., A. BERLE, *POWER* 342 (1969): "[A] revolution has taken place and is in progress" and "the revolutionary committee is the Supreme Court of the United States"; Hutchins, *The Case for Constitutional Change*, 3 CENTER REP. NO. 5 (Dec. 1970) cited in Book Review, 71 COLUM. L. REV. 502 n.4 (1971): "The Court has become 'the highest legislative body in the land.'"

I do not say that the Court has no power; of course it has some. My point is that it is far less than that attributed to it by the conventional wisdom. See A. MILLER, *THE SUPREME COURT: MYTH AND REALITY* (1978).

26. "[I]t is not possible to avoid the conclusion that something quite fundamental has begun to go wrong with Western civilisation." E. MISHAN, *THE ECONOMIC GROWTH DEBATE: AN ASSESSMENT* 265 (1977). If that be so, and I think it is, I am unable to perceive how lawyer-judges sitting on courts will be of much use in trying to extricate *Homo sapiens* from the predicament the species is in. The law schools have not yet come to grips with that situation; study of law, including constitutional law, tends to be based on concepts long since dead or moribund.

27. 418 U.S. 683 (1974).

28. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The limitations on the Executive are political rather than judicial. It is only by an intellectually indefensible fiction that the powers of the President can be deduced from the spare generalities and the silences of Article II. See A. MILLER, *supra* note 2.

In the past, during times of all-out emergency, such as declared war, judges and legislators deferred to the Executive. So it will be in the future—perhaps in the remainder of this century and surely in the 21st. The coalescing problems of the climacteric of mankind will not permit the stately ritual of judicial decision-making or the pulls and tugs of the legislative process. Events will move too fast for that. This is not to say that the Executive will be efficient, merely that that branch will be dominant.

B. *Federalism*

Federalism was the price paid for the Constitution of 1787, which established, in Corwin's terminology, a system of "dual federalism."²⁹ That system has long been moribund: The allegedly sovereign states are more a source of Senators and of presidential candidates than they are repositories of actual governing power. Problems are *national* or *planetary*, and have been since at least the promulgation of the sixteenth amendment. A nation with a central income tax cannot be truly federal, in the sense of dual powers between central and local governments. Economic planning, furthermore, is the scourge of original federalism; splintered, autonomous decision-making cannot be brooked, whether under planning by the "first economy" of the giant corporations or by public government itself.³⁰ Not that planning by government has gone very far; it has not. There can be little doubt, however, that it will quickly develop.

This means that some type of incomes policy and the imposition of wage and price controls are probable—in the near, rather than the far distant, future. At the very least. A consensus is now being formed in the United States that can only lead to economic planning on a grand scale. When it occurs, as it will, the Constitution will be able to tolerate it. There is enough room in the interstices of the affirmative powers in Article I to make that certain. The courts will not impose any barriers. States, then, will ever more become administrative districts for centrally promulgated policies. These policies, be it noted, are established today both by the private governments of the giant corporations and in the rapidly increasing programs of the federal government.³¹

A further meaning is clear, but not likely to get any serious attention: there is no need whatsoever for fifty-one political districts (the states plus the District of Columbia); that decentralized political order makes no sense when laid against the realities of power in the present and emergent constitutional order. One example will suffice to evidence the point: when

29. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

30. See A. MILLER, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* (1976).

31. *Id.*

in recent years New York City got into financial straits, it did not try to solve its own problems and did not even seriously try to get the state government in Albany to extricate it from near bankruptcy. Quite the contrary: the eyes of New York, city and state, swung covetously toward Uncle Deep Pockets in Washington. What useful purpose, in such a circumstance, is served by the cost of running a state government in New York? Examples could be multiplied, but, heeding William of Occam, will not be. The lesson is clear: traditional federalism is dying or may already be dead. The problems of economics and the imperatives of technology are simply too much for, say, Rhode Island or South Dakota, let alone larger and wealthier states. They are even too much, as will be discussed below, for the United States to act alone.

As population increases, as economic growth declines, as the nation becomes even more deeply intertwined with others, that trend will accelerate. Nothing in the Constitution will stop it. Nothing the Supreme Court might do will stop it. We are superstitious and venerate the written word of the fundamental law; but that is constitutional fetishism. Some also venerate the past and the saints—the Founding Fathers—in America's hagiology. The first amendment protects such beliefs and the expression of them. There is nothing unconstitutional about being an antiquarian. It merely does not comport with reality, contemporaneous or futurist. Neither the present nor the future are mere extensions of the past.

C. *Planetary Interdependence*

"It has seldom been more important," *The Economist* said in April 1978, "to gear national policies to fit international goals, rather than the other way round."³² Precisely. The problem for American constitutionalism is the further adaptation of an essentially domestic fundamental law to the realities of life on a shrinking planet. Science and technology have diminished time and distance. The United States has an interest in happenings anywhere in the world—and, indeed, far into outer space. This, again, is something new under the constitutional sun.

Can those necessary accommodations, which are sure to come—have already come—be made without amendment? Professor Paul Freund, peering into the future in 1956, maintained that "any really thoroughgoing commitment to supranational authority would be brought about by constitutional amendment, necessarily so if the measures of the world union were to be established as the supreme law of the land secured against change brought about by subsequent national legislation."³³ No doubt that is true if, but only if, the change is a "thoroughgoing commitment to supranational authority"; by no means is it likely that such

32. *Moving the World Uphill*, *The Economist* (London), April 29, 1978, at 89, col.1.

33. Freund, *Law and the Future: Constitutional Law*, 51 NW. L. REV. 187, 194-95 (1956).

a revolutionary event will occur. Rather, barring catastrophe, changes will come as they usually have come in the development of the Constitution—incrementally.³⁴ American adherence to supranationalism will be built bit by bit, rather like the slow growth of a coral reef instead of a mighty volcanic explosion. If so, then the Constitution as now written can accommodate the accretive commitment to larger than national resolutions of public policy problems.³⁵ Sooner or later, those accretions will become in fact a “thoroughgoing commitment.”

That development has already begun, and surely—absent a catastrophe such as a nuclear war—will continue. The little known but greatly important International Monetary Fund is one example. NATO is another. International commodity agreements others. The list is not long, but it is significant: There is a slow but steady trend toward less than a planetary but more than a national confrontation and resolution of common problems. No constitutional problems of any importance are posed by that trend. Bit by bit sovereignty—that ostensibly indissoluble attribute of nation-states—is being chipped away; slowly, the coral reef of multinationalism grows.

The political development parallels, of course, the actions of businessmen. No American corporation of any consequence is purely domestic in its operations.³⁶ The multinational corporation has become a familiar participant in the world arena. With the businessman goes the lawyer; many American law firms now have branches in other countries, sometimes many branches. The late Stephen Hymer said:

[W]e seem to be in the midst of a major revolution in international relationships as modern science establishes the technological basis for a major advance in the conquest of the material world and the beginnings of truly cosmopolitan production. Multinational corporations are in the vanguard of this revolution, because of their great financial and administrative strength and their close contact with the new technology.³⁷

Corporations often can shape the environment in which the problems of American external relations grow and can also define the axiomatic in public policy. An axiomatic decision is one that is almost automatic—actions by government which are rarely accompanied by debate and do not require any means-end calculation. It is axiomatic, for example, to protect American property abroad. Where economics goes, politics follows—and the Constitution is not far behind. The question is not

34. See C. LINDBLOM, *THE POLICY-MAKING PROCESS* (1968).

35. Cf. *A Law for Europe*, *The Economist* (London), June 17, 1978, at 17, col. 1, suggesting that it is “possible for the European court [of the Common market] to play the sort of role the Supreme Court of the United States plays, pioneering political advances by the way it chooses to interpret the Rome treaty.”

36. See R. BARNET & R. MULLER, *GLOBAL REACH* (1974).

37. Hymer, *The Multinational Corporation and the Law of Uneven Development*, in *ECONOMICS AND WORLD ORDER: FROM THE 1970s TO THE 1990s* (Bhagwati ed. 1972).

whether the Constitution follows the flag, as some have said, but whether the decisions by governmental officers, indubitably valid under the Constitution, serve to chip away at the foundations of American sovereignty. The answer can only be yes—today and even more so in the future.

No discussion of foreign affairs should avoid mention of the most perilous of all crises: nuclear war and the proliferation of nuclear capability. Of that, space permits only two statements. First, the possibility—nay, probability—of nuclear war has “amended” the Constitution by making the power to enter into war a presidential, not a congressional, decision. Presidents—for example, Lyndon Johnson and Richard Nixon—publicly assert a power in the President to use lesser violence without regard to Congress.³⁸ The Vietnam conflict is the classic instance of that position. But there are others. Second, nuclear war will mean that for the first time, save perhaps for the Civil War, violence will have been “socialized” for Americans. All of us, particularly those in metropolitan areas, are vulnerable, either to attack from another nation or from some terrorist who succeeds in constructing a nuclear device.

In all of this the Constitution is irrelevant. Emergency is the problem, and survival is the goal. Law of any type will not stand in the way of attempted fulfillment of that most fundamental of all the aims of any society. “The possibility of all-out thermonuclear war,” Dr. Harrison Brown says, “is the most serious danger confronting industrial civilization today.”³⁹ Nothing in the Constitution or any other law will inhibit those who govern us from trying to prevent that catastrophe; or if it happens, doing what is necessary to cope with it.

D. *Private Governance*

More than thirty years ago Alexander Pekelis predicted that the next generation of constitutional lawyers would be concerned with the problems of private governments, by which he meant mainly the giant corporations.⁴⁰ He was echoed by Adolf Berle, among others.⁴¹ They

38. President Johnson's views on his powers in Vietnam are quoted in G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 442 (1975); for President Nixon's views, see Select Committee to Study Governmental Operations with Respect to Intelligence Activities, United States Senate, Final Report, Book IV at 157-58 (1976) (Nixon's answer to an interrogatory). President Ford held similar views, as in the Mayaguez incident. See A. MILLER, *supra* note 15, at 192-94. Historically a similar pattern is visible. See L. FISHER, *THE CONSTITUTION BETWEEN FRIENDS* (1978); J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (rev. ed. 1951).

39. H. BROWN, *supra* note 7, at 180.

40. Pekelis, *Private Governments and the Federal Constitution*, in *LAW AND SOCIAL ACTION* 91 (M. Knovitz ed. 1950).

41. The relevant citations may be found in Miller, *The Corporation as a Private Government in the World Community*, 46 VA. L. REV. 1539 (1960).

were only partially correct. The Supreme Court, which broke new ground in *Marsh v. Alabama*,⁴² extended that decision in 1968;⁴³ but with the advent of the Nixon Court, that movement was aborted. *Tanner*⁴⁴ and *Hudgens*⁴⁵ make it clear that the present Court is quite unwilling to equate private power with public governance—and thus to extend the state action principle to cover some of the pluralistic social groups of the nation. Whether that doctrine of the Nixon Court will endure is the question. Despite evidence to the contrary, the answer, in my judgment, is negative.

The time has come—indeed, it is long past—for the giant corporation to be “constitutionalized.”⁴⁶ That this will be done—that Pekelis’ forecast will come true—seems reasonably sure. First, in such statutes as the Civil Rights Act of 1964, Congress in effect made private enterprises subject to something akin to constitutional restraints. Equal opportunity became a statutory right, upheld by the Supreme Court. There was less need, then, to apply the fourteenth amendment to private corporations, for they had come under the aegis of a congressional command. Second, the Court in at least two 1978 decisions gave corporations the protections of the first and fourth amendments.⁴⁷ Those who receive such protection will ultimately have to pay the price of an obligation to obey the Constitution themselves. Finally, more and more people—for example, Professor David Ewing of the Harvard Business School⁴⁸—are coming to perceive the immense power of corporations and to argue that there should be an employee’s bill of rights. The giant corporation simply does not fit the realities of orthodox constitutional theory and interpretation. “Constitutionalizing” it is, therefore, an idea whose time has come. Despite the present composition of the Supreme Court, the questions of arbitrary treatment by private groups will not be easily quelled. The corporation is a constitutional person (for diversity cases, it is a citizen) and should be held to the view, as Justice Black put it in the *Korematsu* case,⁴⁹ that citizenship—personhood—has its duties as well as its rights.

One could argue, as Justices Black⁵⁰ and Douglas⁵¹ did, that the corporation should be “depersonalized.” After all, it was not until 1886, and then casually without hearing argument, that the Supreme Court

42. *Marsh v. Alabama*, 326 U.S. 501 (1946).

43. *Food Employees Union, Local 590 v. Logan Valley Plaza, Inc.* 391 U.S. 308 (1968).

44. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

45. *Hudgens v. NLRB*, 424 U.S. 507 (1976).

46. See A. MILLER, *supra* note 30; Miller, *Toward “Constitutionalizing” the Corporation: A Speculative Essay*, 80 W. VA. L. REV. 187 (1978).

47. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307 (1978).

48. D. EWING, *FREEDOM INSIDE THE ORGANIZATION* (1977).

49. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding military curfew of persons of Japanese ancestry even though many were native-born American citizens).

50. *Connecticut Life Ins. Co. v. Johnson*, 303 U.S. 77, 85 (1938) (Black, J., dissenting).

51. *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 579 (1949) (Douglas, J., dissenting).

endowed the corporation with the status of a constitutional person.⁵² What the Court has wrought it can take away; but in this instance it is not likely to do so. Far more probable is the recognition of the dimension of private governments, a development for which I have argued elsewhere.⁵³ This, after all, is truly an age of collective action. But if private governance is recognized and indeed occurs, and the giant corporation is brought under the ambit of the state-action concept, no one should think that individual freedoms will suddenly take a jump. Some freedoms, yes, but for others the answer is no.

E. *The Individual in the Bureaucratic State*

We live, as Professor James Wilson has argued, in the age of administration,⁵⁴ at a time when the bureaucratic state has risen to a position of great prominence and influence. That development has crucial significance for the relationship of the individual *qua* individual vis-a-vis the state. The natural person confronts bureaucracies wherever he turns. With some exceptions, of course, he works in groups, socializes in groups, and does almost everything except die (and sometimes even then) as a member of a group.

That, too, is a fairly recent development, at least to the extent to which it exists today. Yesteryear was different, but only in degree. The net result is starkly clear: The individual spends his life as a member of groups and is significant only as a member of groups. Whatever may have been the original theory behind the Constitution, the United States is not composed of atomistic individuals operating as such. As long go as 1927, John Dewey maintained that

the human being whom we fasten upon as individual *par excellence* is moved and regulated by his association with others; what he does and what the consequences of his behavior are, what his experience consists of, cannot even be described, much less accounted for, in isolation.⁵⁵

Political scientists since Arthur Bentley, writing in 1908,⁵⁶ have viewed the political process as the clash of conflicting groups. So, too, with economists; Peter Drucker is an example: it is "the organization rather than the individual which is productive in an industrial system."⁵⁷ Lawyers have lagged behind, although the Supreme Court in recent years has found a constitutional right of association in the delphic pronounce-

52. *Santa Clara County v. Southern Pac. R. Co.*, 118 U.S. 394 (1886); see Justice Rehnquist's dissenting opinion in *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 822 (1978) (Rehnquist, J., dissenting).

53. A. MILLER, *supra* note 30.

54. Wilson, *The Rise of the Bureaucratic State*, 41 THE PUB. INTEREST 77 (Fall 1975).

55. J. DEWEY, *THE PUBLIC AND ITS PROBLEMS* 188 (1927).

56. A. BENTLEY, *THE PROCESS OF GOVERNMENT* (1908).

57. P. DRUCKER, *THE NEW SOCIETY* 6 (1950).

ments of the first amendment.⁵⁸ The "organizational revolution"—Kenneth Boulding's term⁵⁹—is slowly finding its way into constitutional law.

This has large consequences. First, freedom under the Constitution is ever increasingly becoming merely freedom of which group to join. Even then, some groups limit membership. I have elsewhere argued that the Supreme Court, albeit unwittingly, is putting Thomas Hill Green's view of freedom in a social organization into the notion of individual liberty.⁶⁰ The key case—the turning point—was *West Coast Hotel Co. v. Parrish*.⁶¹ When the Court legitimized congressional encouragement of group action in the *Jones & Laughlin* case,⁶² the pattern became clear. *NAACP v. Alabama ex rel. Patterson*⁶³ merely capped a previous development.

Individual liberty, in the second place, is subject to the constraints, often arbitrary, of the group—rather, groups—in which the natural person operates. This is best seen, perhaps, in the business corporation, where, as noted above, the problem of individual rights in the working place is now getting more attention. But it also appears, *inter alia*, in labor unions and in private clubs. The individual is submerged into the overall well-being of the group, as determined by those—usually an oligarchy—who control it.⁶⁴

Third, an inability to join a group may result in severe deprivations. For example, when a "whistle blower" is fired by a company (or government agency), he finds it difficult to locate other employment. Polygraph tests, imperfect though they are to determine a person's integrity, are nonetheless widely used. With the increasing use of computers and data processing, a person's record follows him wherever he goes; and all too often he finds doors barred to him for reasons about which he knows nothing.

Finally, the individual is powerless, or almost so, in trying to alter group behavior, whether in a public or a private bureaucracy. Not always, to be sure. On occasion the lone person can and does make a difference,⁶⁵ but only if he can use another group—e.g., Congress, the judiciary, or an

58. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). See D. FELLMAN, *THE CONSTITUTIONAL RIGHT OF ASSOCIATION* (1963).

59. K. BOULDING, *THE ORGANIZATIONAL REVOLUTION* (1953).

60. Miller, *Toward A Concept of Constitutional Duty*, 1968 SUP. CT. REV. 199 (1968).

61. 300 U.S. 379 (1937).

62. *NLRB v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).

63. 357 U.S. 449 (1958). The deeper meaning is that concept of "status" may now be seen, at least in an emergent state, in constitutional law. The rights and liberties of some Americans, that is, depend on the group to which they belong. The obvious example is military personnel; but many others exist. Constitutional law scholarship has done little or nothing to note this important development. But see R. HORN, *GROUPS AND THE CONSTITUTION* (1956); Phillips, *Thomas Hill Green, Positive Freedom and the United States Supreme Court*, 25 EMORY L. J. 63 (1976).

64. The reference here is to Michels' "iron law of oligarchy." See R. MICHELS, *POLITICAL PARTIES* (1911).

65. Ralph Nader is perhaps the best example.

economic power group, such as a union—to help him in disputes with, say, a private corporation or a governmental agency. The pattern, however, is otherwise.

That the movement toward bureaucracy will both continue and intensify cannot be seriously doubted. As population grows, as technology continues its dizzy pace, as cities expand, as corporations grow, as government becomes even larger, as emergencies occur, as they will, the natural person will find that he faces a congeries of groups too powerful to battle. The Constitution will not bar that continuing development.

Paradoxically, at the very time that the nature of freedom has changed (in the four decades since *Parrish*), there are more individual freedoms of a certain type than ever before. Right now—1979—the individual is more protected by the Constitution and judicial (and other) interpretation than at any previous time in American history. This is the Golden Age of individual rights (of a certain type). The reasons for this seeming paradox are not hard to locate. One is economic: Human freedoms are more fully protected today because of the high growth rate in the economy since the late 1930s. This means that the economic pie was for about thirty-five years getting larger and that more people could get a slice of it than ever before. Since necessitous men cannot be free men, that means that the gross national product had a definite relationship to the recent expansion of freedoms. However, economic growth has slowed and may be stopping. If that continues, as I think it will, then more and more people will be contesting for a relatively smaller pie. People will be willing to forego other freedoms in order to obtain an adequate income. In other words, the social basis of the recent expansion of freedoms appears to be vanishing. (Even more portentous is the high probability of social turmoil.) In the unlikely event that zero population growth is attained, it will not be until far in the future; the number of Americans will total at least 300 million in the 21st century—a 50 percent increase over today.⁶⁶

Of more importance, however, is the fact that individual freedoms are permitted or tolerated by the state only when important interests of the state are not jeopardized. *Cohen v. California*⁶⁷ is an example; whether Cohen would have prevailed at, say, the time that *United States v. O'Brien*⁶⁸ was decided is far from self-evident. Why someone should be able publicly to flaunt a "Fuck the Draft" slogan on his jacket while another who burned his draft card in protest against Vietnam went to jail is explainable, in my view, only because in *Cohen* the interests of the state at that time were not jeopardized. In *O'Brien*, the interests of the state were held to be significant because public opposition to Vietnam had not yet hardened.

66. See 6 INTERCOM 3 (1978).

67. 403 U.S. 15 (1971).

68. 391 U.S. 367 (1968).

This can, and should, be put in a different way; as Professor J. A. G. Griffith said in his recent important book, *The Politics of the Judiciary*: "[T]he judiciary in any modern industrial society, however composed, under whatever economic system, is an essential part of the system of government and . . . its function may be described as underpinning the stability of that system from attack by resisting attempts to change it."⁶⁹ The three years between *O'Brien* (1968) and *Cohen* (1971) should be viewed as years in which the *zeitgeist* noticeably turned against the Vietnam conflict. So Cohen got off; O'Brien deserved at least the same, and probably more.

There is a larger, deeper meaning to what has been said. As more and more economic controls are placed on the individual, by both public and private governments, a subtle tradeoff is occurring. Freedom in personal lifestyles is being permitted, but only when the stability of the system is not threatened. That, it seems to me, is the probable reason for permitting today what would once have been called obscene, for the decision in *Stanley v. Georgia*,⁷⁰ for permissiveness in cohabitation, for the probable legalization of marijuana, for the widespread use of other narcotics without punishment, for acceptance of other behavior patterns (e.g., nude bathing). In none of these situations is the stability of the system placed in even minimal jeopardy. Should any one of them do so, it may be said with complete confidence that a crackdown will immediately take place—and will be constitutionally valid.

The "tradeoff" may be likened to Aldous Huxley's soma pills.⁷¹ The people are kept quiescent by individual freedoms that mean something only to the persons, not to "society"⁷² at large or to the state. I am not suggesting that this is a deliberate maneuver, conducted in a dark and conspiratorial way. But, when coupled with the economic factor mentioned above, it does seem to be the most likely explanation of the present-day expansion in individual liberties. Those liberties will continue to grow until such time as they collide with the interests of the state. In economic matters, that collision has already occurred; that will intensify in the future. More "soma pills" will be permitted, as more controls are applied. Whether those "pills" will suffice cannot be answered at this time.

In this connection, it is well to distinguish between authoritarian and totalitarian governments. Under the former—Franco Spain is an example—a considerable amount of personal freedoms (not important to the state) are possible; but under totalitarianism—China, Albania, the U.S.S.R.—total control is the rule. I think the United States will become

69. J. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 213 (1977).

70. 394 U.S. 557 (1969).

71. A. HUXLEY, *BRAVE NEW WORLD* (1932). See A. HUXLEY, *BRAVE NEW WORLD REVISITED* (1958).

72. The concept of society is one of the neglected areas of constitutional scholarship. Judges

authoritarian in the future, but will be able to stave off totalitarianism for some time.

III. CONCLUSION

We have come a long way, at a far too rapid and oversimplified pace. Limitations of time and space did not permit more than conclusory statements. Much has been left out—necessarily so.⁷³ What has been said, furthermore, is controversial. Many, perhaps most, people do not like to think in “gloom and doom” terms. Neither do I. But the facts are there, for those who are able and willing to see them. Dr. Harrison Brown asserts:

Today we are children, but finally after a million or so years our childhood is about to end. With the end of childhood three things can happen: we can exterminate ourselves; we can go back to the ways of life of our ancestors; we can make a quantum jump upward to a new level of civilization, undreamed of by the philosophers of the past.⁷⁴

If he is correct, as I think he is, the final question is whether our governmental institutions—our constitutional order—have the capacity to cope quickly and effectively with the manifold problems of the last part of the twentieth century.

The jury is really not still out on that question. Our obvious inability to deal with both inflation and unemployment, with energy and nuclear proliferation, to mention only a few current problems, does not give much basis for hope. Some constitutional changes could be suggested—but that's another essay. The editors of this *Journal* wisely asked the authors of the symposium to limit themselves to approximately 5000 words. What can be said is that there is enough play in the constitutional joints to enable the political leaders of the nation to take almost any action they wish. Whether they will do so is an entirely different question. That political power is constitutionally permissible does not mean that it will be used. I am not optimistic that the necessary adjustments in public policy will be made. The American system of pluralism is not working.⁷⁵ A nation of avowed pragmatists, who tend to pursue rather narrow, hedonistic goals, is not going to change its ways by rational argument. What will change

and commentators often use the word, but without defining it; or in interest-balancing situations, revealing how societal interests are identified and weighed. Legal writers, including judges, would rather chop logic with appellate judges than think deeply about such matters.

73. One of the more important areas for scholarly consideration is the reconciliation of the concepts of liberty and equality in constitutional interpretation. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977). See also J. RAWLS, *A THEORY OF JUSTICE* (1971) and R. NOZICK, *ANARCHY, THE STATE AND UTOPIA* (1974). I have paid little attention to the economic crisis. On this, see F. ALLVINE & F. TARPLEY, JR., *THE NEW STATE OF THE ECONOMY* (1977). Many other areas need study.

74. H. BROWN, *supra*, note 7, at 249.

75. It does not give enough efficiency in government and it is not protecting individual liberties sufficiently. See T. LOWI, *THE END OF LIBERALISM* (1969). Pluralism works only when there is common, albeit tacit, agreement on the ends of society. See Y. SIMON, *PHILOSOPHY OF DEMOCRATIC GOVERNMENT* (1951). That is precisely the opposite of what is occurring today. See R. MOSS, *THE COLLAPSE OF DEMOCRACY* (1977).

those ways is disaster, actual or imminent; predictions of disaster, including this one, are not enough.

The United States has survived and prospered thus far, not because of the Constitution but in spite of it. Only by extra-constitutional adjustments to the original conception has government operated at all effectively. The crucial problem now is how to make governmental power that is necessary as tolerable and decent as possible. I have suggested elsewhere,⁷⁶ and repeat now, that this at the very least requires rethinking of the concept of separation of powers. The urgent tasks of government must be accomplished, but that power must also be accountable. As matters now stand, we have little efficiency in government and not much accountability. That, in sum, is the pressing constitutional problem of the present and of the coming years.⁷⁷

I return, finally, to Dr. Lester Brown's statement in the headnote to this paper. The "profound social transformation" of which he speaks is already occurring. One has to be at least a glandular optimist to believe that better conditions will come from that transformation. Uncontrolled change is the enemy. We are aboard a train running down the rails out of control; there is no one in the engine cab and there may be demons at the switches; most people, including almost all lawyers, are in the caboose looking backwards.⁷⁸ In such circumstances, to be an optimist one has to be a pessimist. Not a cynic. Not sunk in despair. Merely fully aware of the nature of the problem, with a determination to do something about it.⁷⁹ The challenge is obvious: Will it be met?

76. A. MILLER, *PRESIDENTIAL POWER IN A NUTSHELL* (1977); Miller, *Separation of Powers—Does It Still Work?*, 48 POL. Q. 77 (1977).

77. See Moynihan, *Imperial Government*, 65 COMMENTARY 25 (June 1978).

78. See R. LAPP, *THE NEW PRIESTHOOD: THE SCIENTIFIC ELITE AND THE USES OF POWER* (1965).

79. Compare H. BROWN, *supra* note 7, with E. MISHAN, *supra* note 26. Mishan concludes at 265:

In the circumstances, only an extension of state power and a diminution of personal freedoms will prevent a disintegration into social chaos. And this process . . . is under way. The growing fears today of violence, terrorism and urban disruption, the public's apprehension of the grave threats posed by the new technology, and the intensification of group conflicts within our "pluralistic" societies—all of these untoward features, traceable . . . to the technological revolution of the past century, have weakened popular resistance to the assumption of wider powers of control by modern governments. An instinct for survival is impelling the Western democracies along the road to the totalitarian state.

Dr. Brown is not so despairing:

I am by no means without hope—if I were, "I would not have written this book. . . . In short, I believe that although the dangers which confront us are immense, we nevertheless have it in our power to create a new level of civilization—an abundant, just, and peaceful world in which people can not only develop to their fullest terrestrial potential—they can reach out to the stars as well.

H. BROWN, *supra* note 7, at 10-11.